

FILED

NOT FOR PUBLICATION

DEC 13 2005

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID RIEGER,
Plaintiff-Appellant,

vs.

JO ANNE BARNHART,
COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,
Defendant-Appellee.

No. 05-35028

D.C. No. CV-03-01094-GMK

MEMORANDUM¹

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Submitted December 8, 2005²
Portland, Oregon

Before: D.W. NELSON, O'SCANNLAIN, Circuit Judges, and BURNS,³ District Judge.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

² This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

³ The Honorable Larry Alan Burns, District Judge for the Southern District of California, sitting by designation.

David Rieger appeals the district court's order affirming a determination that he is not entitled to social security disability insurance benefits. He alleges he has been disabled since June 10, 1996. Because the parties are familiar with the facts, we do not recite them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Rieger contends the administrative law judge ("ALJ") erred by giving insufficient weight to the opinions of one of Rieger's treating physicians, T. Britt Simmons, M.D. Dr. Simmons saw Rieger on just two occasions, in February 2001 and in October 2001. He provided a short letter report to Rieger's counsel for use in the disability assessment proceedings in response to two questions, based largely on Rieger's self-reported symptoms and a myofasial back pain diagnosis of a different doctor. The ALJ did not "reject" Dr. Simmon's opinions. In fact, the ALJ expressly found Rieger has myofascial pain syndrome and acknowledged it to be a severe impairment. Moreover, the ALJ recited he actually gave "a fair degree of weight" to Dr. Simmons' opinion, and did not reject the physical functioning limitations accompanying the diagnosed condition. The ALJ applied the proper legal standard and set forth specific, legitimate reasons, based on substantial evidence in the record, to find some of the opinions expressed less persuasive than other evidence in the medical record, in consideration of Dr. Simmons' limited personal contact with Rieger, among other factors. See Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989); Thomas

v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). The ALJ's treatment of Dr. Simmons' brief report was not erroneous.

Rieger also contends the ALJ erred by improperly rejecting Rieger's own testimony. The ALJ did not "reject" his testimony; rather, the ALJ found portions "not entirely credible." The ALJ applied the appropriate legal standards in articulating his credibility findings. See Social Security Ruling ("SSR") 96-7p, available at 1996 WL 374186; Smolen v. Chater, 80 F.3d 1273, 1281-82 (9th Cir. 1996); Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995), and we will not disturb them. We find the ALJ's reasons for discounting Rieger's credibility are clear and convincing and supported by substantial evidence. Rollins v. Massanari, 261 F.3d 853, 856-57 (9th Cir. 2001).

Finally, Rieger argues the ALJ made erroneous assessments of his residual functional capacity ("RFC") and his ability to work, based on his other assignments of error in the ALJ's credibility findings and the treatment of Dr. Simmons' opinions. We find no error in either of those analyses with respect to considerations pertinent to the RFC determination. As those prior findings are based on substantial evidence, the hypothetical was not deficient for positing to the VE only those limitations the ALJ found credible and supported by the record. Osenbrock v. Apfel, 240 F.3d 1157, 1165-66 (9th Cir. 2001); Magallanes, 881 F.2d at 756-57. Although the ALJ erred at Step Four in denying benefits on the ground Rieger could perform his past work as a disc

jockey because that employment was too remote to qualify as relevant past work, the error was harmless. The ALJ continued the analysis through Step Five on the same RFC hypothesis to find Rieger could perform other jobs existing in significant numbers in the local and national economy, properly based on the VE's testimony.⁴

We conclude the ALJ's findings and conclusion were supported by substantial evidence and were free of legal error. Batson v. Comm'r of the Soc. Sec. Admin., 359 F.3d 1190, 1193 (9th Cir. 2004).

AFFIRMED.

⁴ Rieger raises a new argument of Step Five error, alleging an "ambiguity" in the statement of the hypothetical. This Court does not consider arguments not raised in the district court. Edlund v. Massanari, 253 F.3d 1152, 1158 (9th Cir. 2001). Even if the Court reached the merits of that argument, the transcript of the ALJ hearing reveals the VE manifested no confusion, and both Rieger's counsel and the ALJ ensured the scope of the limitations was clarified on the record.